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Supreme Court of the United States

OCTOBER TERM, 1953

No. 407

ROBERT NORBERT GALVAN,

Petitioner,

v.

U. L. PRESS, Officer in Charge, Immigration and Naturalization Service, United States Department of Justice, San Diego, California.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I

A. We have argued in our main brief that the Internal Security Act of 1950 must be read as imposing deportation on past members of the Communist Party only if they knew during their membership that it had the objective of overthrowing the Government. The Congressional purpose for the Act to be so construed was evidenced, *inter alia*, by the statements of the Act's sponsor to this effect and by Congress' intention to use the term membership in the same sense as in the previous deportation law; the 1940 statute, which was the amendment to the deporta-

tion law immediately preceding the instant Act, had been construed by this Court as referring to a knowledgeable connection with the Party. *Bridges* v. *Wixon*, 326 U. S. 135 (see discussion in petitioner's main brief, pp. 42-44). The Government seems unable to explain away the statements of the Act's sponsors as to its intended coverage[1] and entirely ignores the interpretation of the 1940 Act in the *Bridges* case, citing instead a few lower court decisions under prior Acts (see Brief for the United States in *Harisiades*, pp. 43-44). In fact, however, in the great majority of lower court cases even prior to this Court's *Bridges* decision, knowledge was treated as material; and though it is true that in a few of the opinions cited by the Government there were statements to the contrary, in every case but one, the courts took into account that the deportable alien had had knowledge, and had indeed, concurred, in the Party's aim of overthrow at the time of his membership.

Thus, in *Ex parte Vilarino* and *In re Saderquist*, cited by the Government (Harisiades brief, p. 43), the respective courts pointed out that Vilarino, whose Communist Party membership book said he " 'entered Revoluntionary Movement: 1907' ", "was aware of his Party's teaching" (50 F. 2d at p. 586), and that Saderquist understood "the doctrine of the Communist Party * * * (to consist of) the revolutionary views of the Communist International" (11 F. Supp. at p. 526). Similarly, in *Kjar* v. *Doak*, cited by the Government (Harisiades brief, p. 44),

[1] See Respondent's brief in instant case, pp. 67-68, incorporating by reference its argument in *Harisiades* v. *Shaughnessy*, Oct. Term, 1951, Nos. 43, 206, 264; see Brief for United States in *Harisiades* case, pp. 45-57, as to legislative history.

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the Court pointed out that the alien subscribed to Communist Party principles and that, even conceding the correctness of his interpretation of these principles, it was engaged in the advocacy of unlawful violence (61 F. 2d at p. 586). The sole case of those cited by the Government in which knowledge was in fact disregarded is the *Greco* case (Harisiades brief, p. 44),[2] and even there the Court noted that the alien testified he was "loyal to" and a "good member" of the organization there in question (the Trade Union Unity League) (63 F. 2d at p. 864)—a circumstance giving rise to an inference of knowledge.

And contradicting the Government's argument as to the course of decision in the lower courts under previous deportation acts, are the numerous decisions not treated in its brief, in which the courts assumed the materiality of knowledge and emphasized, in holding the alien deportable, his personal knowledge and endorsement of the Party's subversive aim during his membership. *Branch* v. *Cahill*, 88 F. 2d 545, 546 (C. A. 9, 1937); *Fortmueller* v. *Commissioner*, 14 F. Supp. 484 (S. D. N. Y., 1936); *Lisafeld* v. *Smith*, 2 F. 2d 90, 91 (W. D. N. Y., 1924); *United States* v. *Wallis*, 268 Fed. 413, 415 (S. D. N. Y., 1920). And see *United States* v. *Reimer*, 79 F. 2d 315, 317 (C. A. 2, 1935) discussed in petitioner's main brief, p. 21.

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[2] A similar opinion cited by the Government (*Harisiades* brief, p. 44) was rendered by the District Court in the *Bridges* case, but this decision was reversed in this respect in *Bridges* v. *Wixon*, 326 U. S. 135. The Government also cites (*Harisiades* brief, p. 43) *Skeffington* v. *Katzeff*, 277 Fed. 129 (C. A. 1), but there the Government had not appealed from the District Court's ruling that innocent members were not deportable (see *Harisiades* brief, p. 46, note 26), and the only issue presented or discussed on appeal was whether the Party advocated violence.

Thus, if the lower court decisions are to be taken into account in considering the intended construction of the instant Act, we find that the bulk of them do not support the Government's position. And in any event it is clear that none of the decisions dealt with membership during a period such as the early 1940's when the Communist Party was affirmatively supporting this Government, nor did any of them envisage disregard of knowledge in the case of such a member. Nor was such membership involved or envisaged in this Court's opinion in the *Harisiades* case. Membership during such a period is, however, a crucial consideration in the instant case; for petitioner, if he joined the Party at all, was a member during or directly following the Party's Win-the-War era, and it is likely that a large number of the other aliens deportable under the instant statute were members only during that or a similar interval (see our main brief, pp. 29, 33-34, and discussion infra, p. 5).

B. Whether the *Harisiades* case was, as the Government maintains, presented to this Court on the basis that knowledge was immaterial, is a difficult question. While there are some statements in the *Harisiades* brief to this effect, on the other hand, the Government, unable to refute the statements of the Act's sponsor that it was intended to refer only to knowing membership, argued that the aliens involved in *Harisiades* were deportable because of their knowledge of the Party's aim of overthrow (Harisiades brief, pp. 45-49).

For a rational construction, it is more essential to read the instant statute as requiring knowledge than it was in the case of the statute involved in *Harisiades;* for under that statute the alien was deportable only if it were

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found that he belonged to the Communist Party at a time when it advocated violent overthrow of the Government. If, however, the instant statute were construed to preclude the knowledge requirement, the alien could be deported though he was a member of the Party only during a period when it was affirmatively supporting this Government and though he did not know overthrow had been or was to be its program. A sophisticated historical perspective as to the Communist Party cannot be assumed on the part of an alien joining in response to such appeals as those set forth in the Appendix to our main brief.

And no documentation, but mere recollection, is required to establish that, particularly during the war-time alliance with Russia, the manifested spirit in official Washington, demonstrated by public testimonials to Soviet-American friendship and such acts as the pardon of Earl Browder, was friendly toward Russia and tolerant to the Communist Party, whatever may have been the prescient suspicions among "some in the highest quarters" (Resp. Br. 62). As pointed out in our main brief (pp. 29, 33-34), since the Party had its highest membership during the Soviet-American alliance, and petitioner, assuming arguendo he joined the Party, was a member during or directly following this period, it would on this ground alone be against reason to assume that he or many of those deportable under this Act had knowledge that the Party had a subversive, in addition to its "progressive," aim.[3]

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[3] The Government, attempting to depreciate (Resp. Br., p. 24, note 14) the force of this Court's decisions holding it unreasonable and arbitrary to fail to differentiate between innocent and knowing membership (discussed in petitioner's main brief, pp. 35-38), states that the statutes involved in those decisions related to "front" organizations as well as the Communist Party itself. But the subject

II

A. The Government, disregarding the emasculation of due process resulting from the Congressional practice of proscribing a specific group, as in the instant Act (see petitioner's main brief, pp. 47-51), argues that Congressional proscription of persons who were members of the Communist Party at any and all past times is justified largely because there were statements by Congressional committees in 1931 and 1935 that the Party then advocated violent overthrow (Resp. Br. 40-42), and because there were some lower court decisions that findings of advocacy of violence by the Communist Party in various years, were supported by evidence (Resp. Br. 51). But these decisions were merely on particular submissions of evidence at particular times and are no basis for establishing a conclusive presumption as to the Party's character for all past times. As pointed out in our main brief (p. 31), courts of equal authority to those cited by the Government came to the contrary conclusion.[4] But even giving weight to the decisions cited by the Government and even assuming that the Party's character during all the years listed in the Government's brief was therein considered (though in fact it was not[5]), it is important to

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of the proscription in those cases was membership in organizations advocating violent overthrow of the Government, a category which, if including organizations other than the Communist Party, would include equally dangerous organizations.

[4] Respondent's note as to the status of findings by the immigration officials on the nature of the Party (Resp. Br., note 39, p. 54) must be read in a qualified light in view of these decisions.

[5] In *Harisiades* v. *Shaughnessy*, 187 F. 2d 137 (C. A. 2, 1951), for example, though the alien was a member of the Party from 1925 to 1939, the period noted in the Government's brief, the Court did not need to, and did not consider whether the Party advocated violence during this entire time.

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note that there are no Congressional declarations nor court decisions as to 1941 to 1945, which was the time of the Party's highest membership, and the period which would have influenced petitioner if he in fact became a member. Further, it is for the previous decade, the 1930's, in which the membership was near its peak, that there are court holdings contrary to those cited by the Government. Thus, the possibility that aliens deportable under the instant Act could prove that the organization did not advocate overthrow of the Government at the time of their membership is far from the academic proposition that the Government pictures. And we wish to emphasize, contrary to the Government's implication (Resp. Br. 40, 50), that all the findings in the Act relate to the danger from those presently active in the Party; there is no reference in the findings either to the character of the Party in the past or to any danger from past members. The Government's brief is likewise directed in major part to the present character of the Party (Resp. Br. 44-50, and note 38, p. 53).

B. In all events, however, we regard the presence or absence of Congressional study, deliberation, or findings as immaterial (cf. *Lyons* v. *Wood*, 153 U. S. 649; *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 227; *United States* v. *Carolene Products Co.*, 304 U. S. 144, 152). We maintain that Congress cannot make what is in its essential nature a quasi-judicial determination, by legislative fiat; if it could substitute the legislative process for the judicial or quasi-judicial because it had a reasonable basis for its conclusion, the due process guarantee of a fair hearing would be destroyed (see petitioner's main brief, pp. 46-52). The guarantee cannot be avoided by changing

the forum of decision. See *Prentis*, 211 U. S. at p. 227. And the argument of administrative convenience cannot prevail over the need for basic fairness and just procedure. Compare *Estep* v. *United States*, 327 U. S. 122; *Gibson* v. *United States*, 329 U. S. 338.

The Government's attempt to show that the instant Congressional mandate to deport members of a specified organization is not unprecedented, by citing the much-criticized and now repealed statute for the deportation of Chinese and the provision respecting anarchists, does not seem persuasive. The Chinese deportation law was based and validated on an assumption of general racial peculiarity and inferiority (see quotation from *Fong Yue Ting* v. *United States*, Resp. Br. 55-56); Congress did not there, as it has here, enact into a conclusive presumption its determination as to the conduct and beliefs of a specific organization of identifiable individuals during past periods —a determination appropriate for and customarily made in quasi-judicial proceedings. As to the law for deportation of anarchists, this seems to us the customary type of proscription of aliens with certain convictions and we fail to see that Congress there assumed in any way the function of determining the characteristics of a specific organization and proscribing it, as it did in passing the instant Act.[6]

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[6] It seems clear that this Court did not express approval in *Tiaco* v. *Forbes*, 228 U. S. 549 (Resp. Br., p. 22), of the legislature's exercising power of this type, but merely approved a legislative grant of authority to the executive to determine which aliens were a menace to public order.

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III

The Government's attempt to analogize to the Alien Enemy Act and the power over enemy aliens seems to us misplaced and dangerous. The alien enemy has a uniquely precarious status; he is not even entitled to the Constitutional right accorded other aliens to a hearing prior to his expulsion. See *Ludecke* v. *Watkins*, 335 U. S. 160, 171, and dissenting opinions therein. This drastic and arbitrary power which is in a sense a survival from a less humanitarian time (see *Ex parte Kawato*, 317 U. S. 69) is justified only on the basis that it relates to a special and narrowly defined category of person. To analogize from this power, and to stretch the concept of enemy out of its established confines would be to extend a unique rule into a general principle with the dangerous "'tendency of a principle to expand itself to the limit of its logic'." [7] Unless the line between war-time and peace-time governmental powers is preserved, emergency with the dictatorial powers appropriate thereto will become normalcy.[8] Whatever may be the treatment of aliens by other countries, our Constitution establishes with respect to the treatment of aliens in this country "a standard for our Government which the Constitution does not make dependent upon the standards of other governments." *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 492.

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[7] See quotation from Judge Cardozo in Justice Jackson's dissent in *Korematsu* v. *United States*, 323 U. S. 214, 246.

[8] See Justice Jackson's dissent in *Korematsu*, 323 U. S. at pp. 242-247, passim.

IV

Petitioner's counsel respectfully asks leave to call to the Court's attention a misstatement of fact, prejudicial to petitioner, in our main brief.[9] Instead of finding that petitioner was a member of the Communist Party from 1944 to 1948, as stated in the main brief (p. 4), the record shows that the Immigration Service found him to be a member only between 1944 and 1946 (T. 31-32).[10] This limited finding of membership shows the irrelevance of the Government's statement that "membership during that period (1946-1947) is sufficient under the statute" (Resp. Br. 77), since the administrators made no finding of such membership; and it likewise demonstrates the irrelevance of the Government's speculative suspicion that events in March 1947 (Resp. Br. p. 38, note 25) might have influenced petitioner's decision to leave the Party.

Further, the fact that petitioner was found to be a member only until 1946 shows that the Service discredited

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[9] The error in the main brief, which counsel greatly regrets, occurred because the record herein was not printed, due to petitioner's poverty; and present counsel, not having available during the preparation of the brief a copy of the administrative findings, assumed the accuracy of the statement regarding them in the Government's brief in opposition to the petition for certiorari, which was in fact erroneous.

[10] The hearing officer so found (T. 31-32); the Assistant Commissioner, making no express finding as to petitioner's period of membership, referred in his discussion of the evidence only to petitioner's alleged admission of membership from 1944 to 1946 and to his testimony that he last attended a meeting in January, 1947. The Board of Immigration Appeals merely found without specification of time or mention of evidence, that petitioner had been a member of the Communist Party. The decisions of the Assistant Commissioner and the Board have been filed with the Clerk of this Court.

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the witness Meza,[11] on whose testimony the Government relies (Resp. Br. 72-78). Indeed, it is clear from this finding and the discussions of the evidence both by the hearing officer and the assistant commissioner that the deportation order rests exclusively on petitioner's purported admissions, already shown in our main brief (pp. 12-13) to furnish no support for the order. While it may be true that petitioner had no right to counsel at the preliminary examination where these "admissions" were made (Resp. Br. 75), we submit that the fact-finding administrative officials, if conscientiously attempting to insure him the fair hearing guaranteed by the Constitution, should have because of his lack of counsel been at particular pains to determine whether the "admisson" was a statement of the truth or a result of misleading questions. The Government's implication (Resp. Br. 74) that the administrators were entitled to hold against petitioner any statement he may have been led to make, without concern for its accuracy, shows no regard for their duty to properly and diligently perform their quasi-judicial function.

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[11] Meza's alleged conversation with petitioner as to his Communist Party membership took place, according to her testimony, after a Party meeting she alleged they attended in May or June, 1947 (T. 126-127), a date subsequent to the time of termination of petitioner's membership, under the Immigration Service's finding.

CONCLUSION

For the foregoing reasons and those discussed in our main brief, we again respectfully submit that the judgment of the Court below should be reversed; the deportation order should be void; and the statute as here interpreted held unconstitutional.

Respectfully submitted,

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January, 1954.

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